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IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PHILIP J. MARTINET, Individually, On Behalf of All Others Similarly Situated, and on Behalf of the General Public, Plaintiff, v. SPHERION ATLANTIC ENTERPRISES LLC, a Delaware Limited Liability Company; and DOES 1 through 50, inclusive, Defendants.	**CIVIL NO. 07-CV-02178 W (AJB)** **CLASS ACTION** **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR A PROTECTIVE ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 26(c)** **Date:** **May 16, 2008** **Time:** **10:00 a.m.** **Courtroom:** **A – First Floor** **Judge:** **Hon. Anthony J. Battaglia**

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Plaintiff PHILIP J. MARTINET ("Plaintiff") submits this opposition to the motion for a protective order brought by Defendant SPHERION ATLANTIC ENTERPRISES LLC ("Defendant") under Fed. R. Civ. P. 26(c). For the reasons set forth below, Plaintiff respectfully requests that Defendant's motion be denied.

I. INTRODUCTION

This case arises out of the alleged unlawful employment practices of one of California's largest employment agencies, Spherion Atlantic Enterprises, LLC. Plaintiff and putative class representative Philip Martinet, a former hourly, non-exempt employee of Defendant, alleges that Defendant has routinely subjected its non-exempt, hourly employees to numerous California Labor Code violations. Seeking to enjoin and obtain redress for Defendants' unlawful employment practices, Plaintiff filed this class action complaint on behalf of himself and Defendant's other current and former California hourly, non-exempt employees. Plaintiff has also brought this action on behalf of the State of California pursuant to the Labor Code Private Attorneys General Act of 2004 ("PAGA") (Labor Code § 2698 *et seq.*) and on behalf of the general public pursuant to California's Unfair Competition Law ("UCL") (Bus. & Prof. Code § 17200 *et seq.*).[1]

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[1] Plaintiff's First Amended Complaint, which Defendant answered on January 7, 2008, alleges nine causes of action under the California Labor Code and UCL:

1. Unlawful Deductions of Earned Wages In Violation of California Labor Code §§ 204 & 221;
2. Failure to Pay Overtime In Violation of California Labor Code §§ 510 & 1194;
3. Failure to Provide Meal Breaks, Or Compensation in Lieu Thereof (California Labor Code §§ 226.7, 512; Cal. Code Regs., Title 8 § 11040);
4. Failure to Provide Rest Periods, Or Compensation in Lieu Thereof (California Labor Code § 226.7; Cal. Code Regs., Title 8 § 11040);
5. Failure to Reimburse for Reasonable Business Expenses (California Labor Code § 2802);
6. Failure to Provide Properly Itemized Wage Statements (California Labor Code § 226, 226.3);
7. Failure to Pay Compensation at Time of Termination In Violation of California Labor Code §§ 201-203;
8. Unlawful and Unfair Business Practices (California Business & Professions Code § 17200 *et seq.*);
9. Labor Code Private Attorney General Act of 2004 (California Labor Code § 2698 *et seq.*).

As set forth in paragraph 25 of Plaintiff's First Amended Complaint ("FAC"), Plaintiff seeks to represent a class and subclass, defined as follows:

a. All current and former California-based, hourly, non-exempt employees of Defendant SPHERION ATLANTIC ENTERPRISES LLC who were employed by SPHERION ATLANTIC ENTERPRISES LLC between September 25, 2003 and the present (hereinafter, "the CLASS").

b. All current and former California-based, hourly, non-exempt employees of Defendant SPHERION ATLANTIC ENTERPRISES LLC who separated their employment with SPHERION ATLANTIC ENTERPRISES LLC between September 25, 2004 and the present (hereinafter, "the SUBCLASS.")

Following the Early Neutral Evaluation Conference on February 5, 2008, Plaintiff commenced written discovery addressing issues to be litigated in Plaintiff's forthcoming motion for class certification. In the present motion, Defendant has asked this Court for a protective order denying Plaintiff the well-established right to conduct pre-class certification discovery. In essence, Defendant's motion puts the cart-before-the-horse and argues that Plaintiff should be prevented from pursing discovery on the key precertification issues of numerosity, commonality, typicality and adequacy of representation[2] because, as Defendant contends, the proposed class can never be certified. Defendant fails to cite one persuasive case that supports this novel argument in the wage and hour context.

Defendant's motion for a protective order misconstrues the applicable law and fails to meet the heavy burden imposed on a party seeking to prevent discovery. Additionally, a portion of Defendant's motion is premature in that it addresses discovery items not yet discussed by the parties during the meet and confer process. Accordingly, Defendant's motion should be denied.

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[2] *See Oppenheimer Fund, Inc. v. Sanders* (1978) 437 U.S. 340, 351 n.13 ("[D]iscovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation.").

II. DEFENDANT HAS SATISFIED RULE 26(c)'s MEET AND CONFER REQUIREMENTS ONLY WITH RESPECT TO PLAINTIFF'S INTERROGATORY NUMBER ONE AND PLAINTIFF'S REQUEST FOR PRODUCTION NUMBER THREE

"Before moving for a protective order, a party must confer or attempt to confer in good faith with other affected parties in an effort to resolve the dispute without court action." Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial. P 11:1163 (The Rutter Group 2008) – *citing* Fed. R. Civ. P. 26(c)(1).

Defendant's motion for protective order prematurely addresses a number of Plaintiff's discovery requests for which the parties have yet to meet and confer. As set forth in Exhibits F, H, I, J, & L to the Declaration of Brandon R. McKelvey in Support of Defendant's Motion for Protective Order Under Federal Rule of Civil Procedure 26(c) ("McKelvey Decl.") [Docket No. 22-6], counsel have only met and conferred on two of Plaintiff's discovery requests: **Interrogatory Number One** and **Request for Production of Documents Number Three**.[3] Accordingly, the portions of Defendant's motion that address any of Plaintiff's discovery requests, other than these two, is improper and should be summarily rejected.

III. DEFENDANT HAS FAILED TO ESTABLISH "GOOD CAUSE" UNDER THE HEAVY BURDEN SET FORTH IN RULE 26(c)

A Rule 26(c) protective order should be used sparingly. *Medlin v. Andrew* (M.D. NC 1987) 113 F.R.D. 650, 652. In order to obtain a protective order, the party resisting discovery or seeking limitations on discovery must show "good cause" for its issuance. *Jepson, Inc. v. Makita Elec. Works, Ltd.* (7th Cir. 1994) 30 F.3d 854, 858 (the court must find good cause even if the parties stipulate to the protective order); *Gray v. First Winthrop Corp.* (N.D. Cal 1990) 133 F.R.D. 39, 40.

[3] The confirming email chain between counsel dated March 21 & 24, 2008 [Exh. L to McKelvey Decl.] only addresses "the present discovery dispute" set forth in Plaintiff's counsel's "March 19 letter." Plaintiff's counsel's March 19, 2008 letter [Exh. J to McKelvey Decl.] only addressed the two discovery items for which Plaintiff did not grant Defendant a three-week extension to respond: Interrogatory No. 1 and Request for Production No. 3. Pursuant to this extension, Defendant's responses to Plaintiff's numerous other discovery requests were not served until April 2, 2008 [Exh. N to McKelvey Decl.] As a result, Defendant has not submitted any proof of satisfying Rule 26(c)(1)'s meet and confer requirement with respect to all of Plaintiff's discovery requests other than Interrogatory No. 1 and Request for Production No. 3.

The burden is upon the party seeking a protective discovery order to show good cause for the order by demonstrating a specific harm or prejudice that will result from the discovery. *Rivera v. Nibco, Inc.* (9th Cir. 2004) 364 F.3d 1057. "The party requesting a protective order must make a specific demonstration of facts in support of the request...Indeed, the moving party has a heavy burden of showing extraordinary circumstances based on specific facts that would justify such an order." *Alexander v. Federal Bureau of Investigation* (D.D.C. 1998) 186 F.R.D. 71, 75; *Blankenship v. Hearst Corp.* (9th Cir. 1975) 519 F.2d 418, 429 (Under liberal discovery principles of federal rules, those opposing discovery are required to carry a heavy burden of showing why discovery should be denied); *Foltz v. State Farm Mut. Auto Ins. Co.* (9th Cir. 2003) 331 F.3d 1122, 1130 ("broad allegations of harm, unsubstantiated by specific examples or articulate reasoning, do not satisfy the Rule 26(c) test.")[4]

In the case at hand, the declarations submitted by Defendant's officers and managing agents fail to establish good cause. Instead, Defendant's declarations demonstrate Defendant's shockingly outdated and deficient employee records management systems. For example, Defendant's H.R. analysis and reporting manager, Alfredo Echeverria, provides the following admissions in paragraph 7 of his declaration in support of Defendant's motion [Docket No. 22-4]: (1) compiling a list of employees who fall within the applicable statutory period in this case "would be an incredibly difficult task;" (2) some of Defendant's employee database systems "are no longer in operation;" and (3) "providing dates of employment would also be a significant challenge."

It is difficult to determine how this explanation of Defendant's poor records management systems establishes good cause. To the contrary, if our courts were to rely upon this type of testimony in ruling against the disclosure of precertification discovery, California employers would be given an incentive not to maintain accurate and efficient employee record-keeping systems in order to avoid wage and hour class action liability.

[4] Many of the citations in this section were taken from the recent unpublished decision of *WebSideStory, Inc. v. NetRatings, Inc.* (S.D. Cal, filed March 22, 2007) 2007 U.S. Dist. LEXIS 20481.

In addition, Defendant's H.R. manager Joan L. Orzo declares that "Documents related to the employee's assignment, hours, and working conditions *may* be kept by Spherion's on-site personnel *or* at the client's place of business" [emphasis added] (*See* Declaration of Joan L. Orzo in support of Defendant's motion, ¶ 14.) [Docket No. 22-2.] Here, Defendant provides further shocking testimony that it cannot confirm that it has maintained accurate records of employee work hours with respect to all of its employees. Instead, Defendant's H.R. manager states that it may be in the possession of "the client." This is quite extraordinary testimony, especially when considering that "Spherion serves thousands of clients in California...[and] there is a high rate of attrition among a portion of Spherion's clientele as businesses and organizations come and go..." (*Id.*, ¶ 9.) Again, testimony that a portion of Defendant's employee records may have been lost by Defendant's former business clients—who may no longer exist!—does not establish annoyance, embarrassment, oppression, undue burden or expense under Rule 26(c). Rather, it simply establishes that Defendant is currently faced with significant liability under California's strict statutory and regulatory employee record keeping requirements.

For example, California Labor Code § 1174(c) requires California employers to furnish to employees and maintain accurate records "showing the names and addresses of all employees employed." Subsection 1174(d) requires employers to maintain "payroll records showing the hours worked daily by and the wages paid to" California employees. Furthermore, subsection 7 of Title 8, California Code of Regulations, § 11040, entitled "Records," states in pertinent part:

> (A) Every employer shall keep accurate information with respect to each employee including the following:
>
> (1) Full name, home address, occupation and social security number.
>
> (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.

> (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
>
> (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(C) All required records shall be in the English language and in ink or other indelible form, properly dated, showing month, day and year, and shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California. An employee's records shall be available for inspection by the employee upon reasonable request.

Clearly, Defendant's own failure to comply with California's strict employee record maintenance requirements is not proper grounds for establishing "good cause." It is well-settled that Plaintiff and the putative class should not be penalized as a result of Defendant's failure to maintain accurate records in a centralized location. *See Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727. [When an employer's records are inaccurate or inadequate, "the burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."] *See also Aguiar v. Cintas Corp. No. 2* (2007) 144 Cal. App. 4th 121, 124 [Defendant employers in California are responsible for keeping track of employee work time. "Accordingly, it is appropriate to shift the burden of proof on issues regarding employee time spent on DWP contracts to Cintas."]; *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 961-964 [burden of proof in wage-and-hour case on defendant to prove employer recorded proper employee meal breaks]; *Wolfe v. Superior Court* (2003) 107 Cal.App.4th 25, 36 ["the burden of proving a plaintiff has been paid contingent compensation in accord with the parties' agreement is properly placed on a defendant in exclusive control of essential financial records (thereby imposing on the defendant the risk of any incompleteness in such records)"].

IV. DEFENDANT'S PURPORTED BURDEN IS NOT "UNDUE" WHEN EXAMINING PLAINTIFF'S TWO DISPUTED DISCOVERY REQUESTS

Even if Plaintiff's discovery requests would burden Defendant, "the burden must be 'undue' in order to justify a protective order." *Rivera v. NIBCO, Inc.*, *supra,* 364 F.3d at 1066. In order to determine undue burden, the Ninth Circuit has recently explained that a balancing of the parties' interests is required. *Id.* Here, Plaintiff's interests in discovering the information and documentation sought in Interrogatory No. 1 and Request for Production No. 3 greatly outweigh any alleged harm against Defendant.

A. It is Well-Settled That Plaintiff is Entitled to the Information Sought in Interrogatory Number 1 During the Precertification Stage of the Class Action Litigation

The present discovery dispute originally arose out of Defendant's legal objections to Plaintiff's Special Interrogatory No. One**,** which simply requests Defendant to identify (by name and contact information) its non-exempt employees during the applicable statutory period. (*See* Exh. E to McKelvey Decl.) It is well-settled that Defendant's disclosure of such information is required during the precertification stage of the present class action suit.

Numerous California and federal courts have ordered disclosure of this routine precertification discovery request. In *Pioneer Electronics, Inc. v. Superior Court* (2007) 40 Cal. 4th 360, the California Supreme Court has held that the names and phone numbers of putative class members can be disclosed to counsel for the named plaintiff(s) through pre-class certification discovery:

> Contact information regarding the identity of potential class members is generally discoverable, so that a lead plaintiff may learn the names of other persons who might assist in prosecuting the case. Code Civ. Proc., § 2017.010. Such disclosure involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life, such as mass-marketing efforts or unsolicited sales pitches. *Id.* at 373.

Five other California cases have addressed the issue of pre-certification discovery of the identity of class members. Each agrees that disclosure is required. For instance, last year the Court of Appeal, Division Seven, Second Appellate District applied the holding of *Pioneer Electronics* to wage and hour class actions, declaring:

> **The balance of opposing interests here tilts even more in favor of the court's disclosure order than it did in *Pioneer*, because at stake here is the fundamental public policy underlying California's employment laws**. '[T]he prompt payment of wages due an employee is a fundamental policy of this state.' [Citation.] *Belaire-West Landscaping, Inc. v. Superior Court* (2007) 149 Cal. App. 4th 554, 562. [Emphasis added.]

Similarly, in *Parris v. Superior Court* (2003) 109 Cal.App.4th 285, the named plaintiffs sought leave to have pre-certification communication with the class members, and to compel discovery of the names and addresses of potential class members. Division Seven of the Second Appellate District concluded that no leave was required simply to communicate with potential class members, but that the trial court abused its discretion in denying the motion to compel discovery. *Id.* at 290.

Also, in *Best Buy Stores, L.P. v. Superior Court* (2006) 137 Cal.App.4th 772, the representative plaintiff was an attorney who had also intended to represent the class. Intervening authority held that a lawyer could not be both a class representative and class counsel. As a result, plaintiff sought pre-certification discovery to seek additional class representatives. Division Three of the Fourth Appellate District upheld the trial court's order granting such discovery. *Id.* at p. 779.

This year, two additional California decisions were rendered on this issue, each further supporting Plaintiff's position. In *Puerto v. Superior Court* (*Wild Oats*) (2008) 158 Cal.App.4th 1242, the Court of Appeal, Second Appellate District, Division Seven affirmed the holding of *Belaire-West Landscaping, Inc.* and held that an "opt-in notice" ordered by the trial court "unduly hampers petitioners in conducting discovery to which they are entitled by erecting obstacles that not only exceed the protections necessary to adequately guard the privacy rights of the employees involved but also exceed the discovery protections given by law to far more sensitive personal information." [Slip opinion at page 2.]

Furthermore, in *CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273, the Fourth Appellate District, Division One held that the trial court appropriately permitted "precertification discovery in a class action for the purpose of identifying class members who may become substitute plaintiffs in place of named plaintiffs who were not members of the class they purported to represent." *Id.* at 278. The Court reasoned that because there was no state or other pending investigation involving CashCall's secret call monitoring program, absent continuation of the instant class action, there likely would be no other investigation of CashCall's conduct or potential relief obtained by class members for its alleged violations of their privacy rights. *Id.* at 293. "Neither the reasoning nor the result in *First American* [146 Cal.App.4th 1564 (2007)] persuades us that the trial court in this case abused its discretion by granting the plaintiffs' motion for precertification discovery of the identities of class members. Rather, we conclude the trial court, in applying the *Parris* balancing test, did not abuse its discretion." *Id.* at 292.

Several federal district court decisions also overwhelmingly support disclosure in this instance. For example, in *Putnam v. Eli Lilly & Company* (C.D. Cal 2007) 508 F. Supp. 2d 812, the district court granted Plaintiff's motion to compel the names and contact information of hundreds of Defendant's employees. *Id.* at 815. In doing so, the court "balanced defendant's asserted right to privacy against the relevance and necessity of the information being sought by plaintiff" and determined that "plaintiff's needs here outweigh the concerns of defendant." *Id.* at 814.

Also, in *Dibel v. Jenny Craig, Inc.* (S.D Cal, filed February 7, 2008) 2008 U.S. Dist. LEXIS 9127, the district court upheld the magistrate judge's discovery order mandating the disclosure of the identity and contact information of the defendant's employees: "The magistrate judge's finding that these California employees would have knowledge of relevant background facts, regardless of whether they were eligible to participate as members of the class, is not contrary to law." *Id.* at p. * 11, fn. 4.

Similarly, in *Salazar v. Avis Budget Group, Inc.*, 2007 WL 2990281 (S.D. Cal., filed Oct. 10, 2007), the district court applied the ruling outlined in *Pioneer Electronics* and ordered the defendant to disclose the class members' contact information after an "opt-out" notice was given. Foreshadowing the Court of Appeal's ruling in *CashCall, Inc. v. Superior Court*, Magistrate Judge McCurine observed that "the minimal information Plaintiff requests is indeed contemplated under the Federal Rules of Civil Procedure … as basic to the discovery process." *Id.* at *2. He also expressed skepticism about the employer-defendant's professed solicitude for the class members' privacy rights, observing that its conduct suggested that its "concern about the privacy rights of the potential class members is actually driven more by [its own] self-interest." *Id.* Finally, he noted the importance of class actions generally: "[C]lass action lawsuits can serve a valuable social function in addressing the rights of the public. The voice of a class rings more loudly and garners more attention than a single voice."

In support of its motion, Defendant has made a weak attempt to distinguish the present dispute from the aforementioned leading cases. However, Defendant has failed to cite one case supporting its novel argument that Plaintiff's precertification discovery efforts should be barred. On the other hand, Plaintiff relies upon no less than nine cases (each containing its own unique fact patterns and legal rationale) in which the disclosure of putative class members' names and contact information has been ordered. Under well-settled federal and California decisional law, Plaintiff's Interrogatory No. 1 is a routine precertification discovery request that should not be subject to a protective order.

B. Plaintiff is Entitled to the Documentation Sought in Request for Production of Documents Number Three During the Precertification Stage of the Class Action Litigation

The other discovery dispute for which the parties have met and conferred pertains to Plaintiff's Request for Production No. 3, which seeks documents demonstrating Defendant's compliance with California's strict statutory and regulatory law on meal breaks. (*See* Exh. D to McKelvey Decl.) This documentation is also discoverable during the precertification stage of the present class action suit.

Recently, in *Hill v. Eddie Bauer* (C.D. Cal 2007) 242 F.R.D. 556, the district court ordered the production of similar employee time records prior to the filing of the plaintiff's motion for class certification:

> Here, as discussed above, the Court has found plaintiff needs documents responsive to Category (3) document requests to pursue class action certification, as well as to prosecute this action, which seeks to enforce California's labor laws**.** *Id.* at 563 [citations omitted]. [Emphasis added.]

As explained by the California Supreme Court in the landmark *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094 decision, the records sought in document request number three are the central article of proof with respect to Plaintiff's meal break claim:

> Finally, we recognize that the primary purpose of the statutes of limitation is to prevent plaintiffs from asserting stale claims once evidence is no longer fresh and witnesses are no longer available. **Because employers are required to keep all time records, including records of meal periods, for a minimum of three years, employers should have the evidence necessary to defend against plaintiff's claims**. *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th at 1114. [Emphasis added.]

Similarly, in *Cicairos v. Summit Logistic, Inc., supra*, the California Court of Appeal explained the strict requirements of California statutory and regulatory meal break law: "employers have an affirmative obligation to ensure that workers are actually relieved of all duty" during each 30-minute meal period. In addition, *Cicairos* explains that employers "also have a duty, under [the wage orders], **to record** their employees' meal periods." 133 Cal. App. 4th at 962-963. [Emphasis added.] [5]

[5] The applicable regulation addressed by the *Cicairos* court provides that "[e]very employer shall keep accurate information with respect to each employee including…Time records showing when the employee

Once again, Defendant's argument that production of such records would be unduly burdensome is without merit. Following the guidance articulated by the court in *Eddie Bauer*, Plaintiff agreed, during the meet and confer process, to the production of a statistical sampling of records. (*See* Exh. J to McKelvey Decl., pp. 103-104.) However, Plaintiff's offer to provide Defendant with a sampling model created by Plaintiff's retained Economist/Statistician fell on deaf ears. Additionally, Defendant has yet to cite to any authority that conflicts with the court's detailed analysis in *Eddie Bauer*:

> Having determined that documents' responsive to Category (3) document requests seek relevant information regarding the putative class members that plaintiff require to pursue class action certification, and fully responding to these requests would be burdensome to defendant, **the Court finds, nevertheless, plaintiff is entitled to responsive sample information**. See, e.g., *Miller v. Air Line Pilots Ass'n, 108 F.3d 1415, 1425 (D.C. Cir. 1999)* ("[S]ome sort of sampling technique might well provide the appropriate balance between [plaintiff's] interest in data that is accessible and informative and [defendant's] concerns that the request be manageable."); *Barrus v. Dick's Sporting Goods, Inc., 465 F. Supp. 2d 224, 231-32 (W.D. N.Y. 2006)* (district court has authority to limit discovery in class action to a limit number of employer's stores or to a limited number of regions); *Smith v. Lowe's Home Centers, Inc., 236 F.R.D. 354, 357-58 (S.D. Ohio 2006)* (limiting discovery in class action litigation against employer to a "statistically significant representative sampling" is appropriate under *Fed. R. Civ. P. 26*)...Since defendant's approach seems reasonable to the Court, the Court accepts defendant's proposal regarding time-clock records and wage statements; provided, the sampling data addresses all the topics of Category (3) document requests. However, in the event plaintiff's experts are unable to devise some statistical analysis based on the sampling data, and opine they need data from all 1,800 putative class members, then plaintiff may renew her motion and the Court will consider expanding the discovery defendant must produce in response to the Category (3) document requests. At this time, the Court is of the opinion the discovery as limited herein should be sufficient to allow plaintiff to move for class certification, and, based on the Court's equitable powers under *Fed. R. Civ. P. 1*, discovery will be limited regarding the Category (3) document requests, as proposed by defendant. *Hill v. Eddie Bauer*, *supra*, 242 F.R.D. at 564-565. [Emphasis added.]

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begins and ends each work period. **Meal periods**, split shift intervals and total daily hours worked **shall also be recorded**. Meal periods during which operations cease ... need not be recorded. [P] ... [P] ... An employee's records shall be available for inspection by the employee upon reasonable request." Title 8 CCR § 11040 subd. (7)(A)(3) & (7)(C). [Emphasis added.] Defendant's compliance with California's strict record keeping requirement is therefore a common, class-wide question in the present litigation.

Accordingly, at a minimum, Defendant should be required to produce a sampling of records in response to Request for Production No. 3.

V. DEFENDANT'S CHALLENGE TO PLAINTIFF'S CLASS ALLEGATIONS ARE PREMATURE AND WITHOUT MERIT

In support of its motion for a protective order to prevent all pre-class certification discovery, Defendant argues that Plaintiff will never be able to substantiate any of his "baseless class allegations." In essence, Defendant requests that this Court make an immediate determination—based solely on (1) the pleadings and (2) Defendant's self-serving declarations—that Plaintiff's California wage and hour allegations are not suitable for class treatment under Fed. R. Civ. Pro. 23. Such a challenge is both premature and contrary to the significant body of law supporting certification of California wage and hour class action suits.

A. California Wage and Hour Suits Are Routinely Certified for Class Treatment

California wage and hour disputes "routinely proceed as class actions." *Hill v. Eddie Bauer, supra,* 242 F.R.D. at 562. [*citing Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1328.] Premature challenges to proposed class actions under California wage and hour law have been summarily denied. For instance, a pre-motion for class certification challenge was made by one of California's largest employers in *In re Wal-mart Stores, Inc. Wage and Hour Litigation* (N.D. Cal 2007) 505 F. Supp. 2d 609. The *In re Wal-mart Stores, Inc. Wage and Hour Litigation* district court subsequently rejected nearly identical arguments made by Defendant in the case at hand.

After criticizing the proposed class definitions as "somewhat suspicious" (*Id.* at p. 615), the Court still held that Wal-mart's pre-motion for class certification motion was premature:

> Nevertheless, Wal-Mart has not answered in this case, **discovery has not yet commenced, and no motion for class certification has been filed. In the absence of any discovery or specific arguments related to class certification, the Court is not prepared to rule on the propriety of the class allegations and explicitly reserves such a ruling.** While plaintiffs' class definitions are suspicious and may in fact be improper, plaintiffs should at least be given the opportunity to make the case

> for certification based on appropriate discovery of, for example, the electronic employment lists that they claim will identify the class members. Accordingly, Wal-Mart's motions to dismiss or strike the class allegations are premature and are denied, but without prejudice as to Wal-Mart's ability to move to strike or dismiss the class allegations if and when class certification is sought. *Id.* at p. 615-616. [Emphasis added.]

Of particular note, one of the subclasses in the *Wal-mart* litigation is comprised of thousands of hourly employees of retail giant Wal-mart:

> (3) The "Compensation Sub-Class" includes employees who are "properly classified hourly-pay employees of Defendant . . . who have not received all compensation due them for hours worked, including overtime worked." *Id.* at p. 613.[6]

Recently, numerous wage and hour disputes have been certified for class treatment by district courts in our Circuit after the parties conducted precertification discovery. In *Wang v. Chinese Daily News, Inc.* (C.D. Cal. 2005) 231 F.R.D. 602, the Court found that a class consisting of "all former, current, and future non-exempt employees" of the defendant employer satisfied the prerequisites for class certification under FRCP 23(a). *Id.* at 605. The claims in *Wang* are nearly identical to those in the case at hand: "the opportunity to take meal and rest breaks or to receive appropriate penalties in lieu of such breaks; and appropriate payroll records and itemized wage statements containing the information required by state law." *Id.* at 604-605.

In certifying a class comprised of non-exempt, hourly employees holding a variety of job titles and employment positions, the *Wang* court concluded that "common questions of fact include…whether Defendant deprived non-exempt employees of rest and meal breaks; whether

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[6] Despite the court's skepticism of the plaintiff's class allegations at the early stages of the litigation, the court subsequently certified, under Rule 23, a large portion of plaintiff's proposed classes. *See In re Wal-Mart Stores, Inc. Wage and Hour Litigation II* (N.D. Cal., filed Feb. 12, 2008) 2008 U.S. Dist. LEXIS 14756. Thus, the *In re Wal-mart Stores, Inc. Wage and Hour Litigation* decisions are quite instructive to the case at hand in that precertification discovery clearly allowed the *In re Wal-mart Stores, Inc. Wage and Hour Litigation* plaintiffs to establish the elements of Fed. R. Civ. Pro. 23.

Defendant failed to keep accurate records; whether Defendant failed to provide accurate itemized wage statements. Additional common questions of fact include: whether class members receive their pay through a common compensation program or payroll system...These common questions are sufficient to satisfy Rule 23(a)(2)." *Id.* at 607.

The *Wang* court further explains that "**the claims of non-exempt employees present common questions of law and fact and do not depend on specific job duties. Thus, there is no need for each job category to constitute a separate subclass**." *Wang,* 231 F.R.D. at 607. [Emphasis added.] Thus, the court certified a class consisting of non-exempt, hourly employees holding diverse positions throughout the company, including drivers, reporters, deputy city editors, sales employees, advertising account agents, clerks, typists, and account executives.

In another published district court decision, *Mendez v. Radec Corp.* (W.D. NY 2005) 232 F.R.D. 78, the plaintiff was also able to certify a wage and hour class action on behalf of a broad class of employees. Once again, the court rejected the defendant's argument that commonality and typicality could not be met in situations where employees hold different job duties and job titles:

> Defendants argue that Mendez's claims are not typical of or in common with those of the proposed class members, primarily because Mendez was a field manager, and as such was responsible for scheduling, verifying and submitting employees' time and time sheets on the projects under his supervision…
>
> … I am not persuaded by these arguments. Mendez alleges that he was subject to the same unlawful policies as the other class members. **The fact that he had a different job title is irrelevant in terms of the typicality and commonality criteria**. That these employees may have had different duties and performed different types of work is not particularly relevant to whether they are similarly situated with respect to [the named] plaintiff's claims. **What *is* important is that these employees were allegedly subject to a common practice or scheme on Eldre's part of docking salaried employees' pay in violation of the FLSA**. *Id.* at 91-92. [Emphasis added.]

B. Defendant's Manageability Concerns Are Unwarranted

The fact that Defendant has employed numerous non-exempt, hourly employees at various work locations throughout California does not severely impact Plaintiff's ability to certify the putative class. In *Whiteway v. FedEx Kinko's Office & Print Servs.* (N.D. Cal, filed September 14, 2006) 2006 U.S. Dist. LEXIS 69193, the district court certified a statewide wage and hour class action comprised of employees working at 200 FedEx Kinko's centers in California. Numerous class members were employed within FedEx Kinko's distinct "regions," "districts," "centers" "hubs" and "spokes" throughout California.

Similarly, in *Tierno v. Rite Aid Corp.* (N.D. Cal, filed August 31, 2006) 2006 U.S. Dist. LEXIS 71794, the district court certified a class comprised of "all persons employed as Store Managers in any Rite Aid Corporation's California retail drugstores at any time between May 9, 2001 and the present." Despite the fact that the national drugstore chain operates 590 retail stores in California, the district court determined that common issues of law and fact under the California Labor Code predominated.

As explained by another district court, "All questions of law and fact need not be common. Rather, the existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Romero v. Producers Dairy Foods, Inc.* (E.D. Cal 2006) 235 F.R.D. 474, 484.

In *Kurihara v. Best Buy Co.* (N.D. Cal., filed August 30, 2007) 2007 U.S. Dist. LEXIS 64224 granted certification of a class consisting of employees holding various employment positions at Best Buy's numerous retail locations throughout California.

Also, in *Alba v. Papa John's USA* (C.D. Cal., filed Feb. 8, 2007) 2007 U.S. Dist. LEXIS 28079, the district court certified a class comprised of the following employees:

> All employees of Papa John's restaurants owned by PJ Cheese, Inc. and/or PJ United, Inc., throughout the State of California who were classified as non-exempt employees between August 25, 2001 and May 25, 2005, and were not provided rest periods and/or meal periods as required under California law.

C. If Necessary, Plaintiff May Be Allowed Eventually to Amend His Class Allegations to Bring Various Subclasses

Even in the remote possibility that the District Court deems Plaintiff unsuitable as the sole class representative for all putative class members, Plaintiff's counsel may be allowed, post-motion for class certification, to amend the class allegations to add additional subclass representatives. Recent case law supports this approach.

In *Aguiar v. Cintas Corp. No. 2, supra,* 144 Cal. App. 4th at 121, the Court of Appeal reversed the trial court's order denying class certification. In holding that the trial court abused its discretion, *Aguiar* explains that instead of denying class certification and creating separate, duplicative proceedings with "the same or essentially the same arguments and evidence, including expert testimony," the trial court should have certified several subclasses and then granted leave to amend the complaint to ensure that a proper representative of each subclass is joined as a named plaintiff:

> Other putative class members can be represented adequately by a named plaintiff who did not work 20 hours per month on the DWP contracts; and the second amended complaint may be amended once again on remand to add another named plaintiff should it be determined that the subclass of employees who did not work 20 hours per month on the DWP contracts needs an additional, adequate representative. (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872 ["If . . . the court concludes that the named plaintiffs can no longer suitably represent the class, it should at least afford plaintiffs the opportunity to amend their complaint, to redefine the class, or to add new individual plaintiffs, or both, in order to establish a suitable representative"]. *Id.* at 137.

As a result, Plaintiff's present discovery efforts should be allowed to move forward. As explained recently in *CashCall, Inc. v. Superior Court, supra,* disclosure of the names and contact information of putative class members is required in the event that Plaintiff seeks to amend the class allegations:

> Should the trial court conclude that the named plaintiffs may not adequately represent a class, it should afford them an opportunity to amend their complaint to redefine the class or to add new individual plaintiffs. **Because a named plaintiff may not adequately represent the class and may need to amend the complaint to add a new individual plaintiff who will adequately represent the class, precertification discovery to ascertain a suitable class representative is proper. Contact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the**

> **names of other persons who might assist in prosecuting the case.** *CashCall, Inc.*, 159 Cal.App.4th at 284. [Emphasis added.]

D. Defendant's Ninth Circuit Authority is Completely Distinguishable From the Case at Hand

Defendant relies upon a handful of Ninth Circuit decisions that are completely distinguishable from the present putative wage and hour class action. Defendant first relies upon *Doninger v. Pacific Northwest Bell, Inc.* (9th Cir. 1977) 564 F.2d 1304, a Title VII sex discrimination case. Unlike Defendant's present discovery motion, the *Doninger* decision arose out of the Ninth Circuit's review of the district court's denial of the plaintiff's motion for class certification under Fed. R. Civ. P. 23. The Ninth Circuit subsequently affirmed the lower court and determined that it did not abuse its discretion in refusing to allow the employees *further* discovery because the plaintiffs had adequate time to take depositions and failed to do so. *Id.* at 1313. In addition, the employer provided vast quantities of evidence in opposition to the motion for class certification. *Id.*

Of particular note, the Ninth Circuit's guidance in *Doninger* actually supports Plaintiff's position in the case at hand, as the Ninth Circuit took great lengths to point out that it was the *Doninger* plaintiffs' unique and complete failure to conduct timely discovery that led to the Court's ruling:

> **It is true that the better and more advisable practice for a District Court to follow is to afford the litigants an opportunity to present evidence as to whether a class action was maintainable. And, the necessary antecedent to the presentation of evidence is, in most cases, enough discovery to obtain the material, especially when the information is within the sole possession of the defendant**.... [Plaintiffs] were content to rest solely upon the submission of interrogatories, admitting that they made no attempt to obtain depositions from knowledgeable PNB authorities located nearby and readily available. We are therefore driven, **by the particular and unique facts of this case**, to hold that it

> was not an abuse of the trial court's wide discretion to deny discovery before ruling on the motions for class certification. *Id.* [Emphasis added].[7]

Unlike *Doninger*, in the case at hand Plaintiff has diligently conducted timely discovery. But for Defendant's present discovery challenge, Plaintiff's counsel would be in the process of reviewing documents and taking the depositions of Defendant's persons most knowledgeable in preparation for the forthcoming motion for class certification. As a result, *Doninger's* class certification ruling is of no assistance in resolving the present discovery motion.

Defendant also relies upon *Mantolete v. Bolger* (9th Cir. 1985) 767 F.2d 1416, a Rehabilitation Act case involving a plaintiff who suffered from epilepsy and alleged that the United States Postal Service improperly denied her a position because of her disability. Unlike the large body of law supporting wage and hour class actions, the court in *Mantolete* determined that class-wide discovery would be futile due to the inherently individualized proof found in "cases of this nature":

> Here, the district court did not abuse its discretion. The appellant offered two other complaints filed elsewhere by epileptics against the Postal Service. Such a showing, however, does not furnish a compelling basis on which to conclude that the district court's refusal to grant expanded discovery for national class action treatment was an abuse of discretion. Nor does such a showing provide a likelihood that discovery measures will produce persuasive information substantiating the class action

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[7] The particularly unique reason why the Ninth Circuit affirmed the District Court's class certification ruling in *Doninger* is articulated in a subsequent Ninth Circuit decision, *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 955-56:

> The primary reason class certification was inappropriate in *Doninger* was that the putative class would in large part have overlapped with the terms of a consent decree entered into by American Telephone and Telegraph and already applicable to Pacific Northwest Bell employees. "Substantial numbers" of the individuals who would have been class members had waived their claims and accepted relief under the preexisting decree. Additionally, plaintiffs in *Doninger* wanted to rely, in the style that *Falcon* later rejected, on the experiences of a few individuals. Ruling on the commonality question, we found it significant that Pacific Northwest Bell was divided into six "establishments," each with its own affirmative action program, while "[a]ll of the named plaintiffs are employed in one of three establishments. . . ." We reasoned that "[s]ince different affirmative action programs, and thus possibly different patterns and practices, exist in each establishment, appellants would have considerable difficulty in adequately representing class members from the other three PNB establishments."

> allegations. **In addition, determining the propriety of relief in cases of this nature underscores the importance of case-by-case adjudication.** **Whether a particular individual is a "qualified handicapped individual" under the law will necessitate an inquiry into the individual's medical and work history as well as an inquiry into other factors bearing on the person's fitness for a given position**. The district court did not err by denying expanded discovery or dismissing the class action allegations. *Id.* at 1424-25. [Emphasis added.]

Because California wage and hour suits routinely proceed as class actions, the *Mantolete* Court's analysis of the plaintiff's proposed nationwide disability class under the Rehabilitation Act is unpersuasive.

Defendant also curiously cites a red-flagged decision, *Del Campo v. Kennedy* (N.D. Cal 2006) 236 F.R.D. 454. In *Del Campo*, the court denied the defendant's motion to quash with respect to subpoenas served by the plaintiff on two non-parties. In fact, the court denied the defendant's challenges to plaintiff's discovery efforts on the very grounds articulated by Plaintiff in the case at hand; i.e., the *Del Campo* plaintiff's motion for class certification was forthcoming:

> Plaintiff has informed the court that she intends to file a motion to certify a class to encompass class members in California. Therefore, Defendants' motion to quash the subpoena served on non-party Target and in the alternative, for protective order is denied. *Id.* at 460.

Defendant's citation to the *Del Campo* decision, the holding of which actually advances Plaintiff's cause, is further proof of the complete lack of case law supporting Defendant's novel and unsupportable arguments in the present discovery motion.

VI. DEFENDANT'S MOTION IS CONTRARY TO CALIFORNIA'S STRONG PUBLIC POLICY IN FAVOR OF WAGE AND HOUR CLASS ACTIONS

Earlier this year, the United States Supreme Court denied a Petition for a Writ of Certiorari in the Petition encaptioned *Circuit City Stores, Inc. v. Gentry, Supreme Court Case No. 07-998*. The actual question posed in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 was whether lower courts had incorrectly enforced an arbitration clause barring class actions. While the California

Supreme Court didn't determine the enforceability of the provision, it did remand the matter for further unconscionability analysis. In doing so, the *Gentry* decision offered one of the strongest statements in favor of California's class action device, especially in wage & hour cases:

> First, individual awards in wage and hour cases tend to be modest. In addition to the fact that litigation over minimum wage by definition involves the lowest-wage workers, overtime litigation also usually involves workers at the lower end of the pay scale, since professional, executive, and administrative employees are generally exempt from overtime statutes and regulations. *Id.* at pp. 457-458.
>
> A second factor in favor of class actions for these cases, as noted in *Bell*, is that a current employee who individually sues his or her employer is at greater risk of retaliation. We have recognized that retaining one's employment while bringing formal legal action against one's employer is not a viable option for many employees. *Id.* at p. 459.
>
> Third, some individual employees may not sue because they are unaware that their legal rights have been violated. *Id.* at p. 461.
>
> We also agree with the *Bell* court that "class actions may be needed to assure the effective enforcement of statutory policies even though some claims are large enough to provide an incentive for individual action. While employees may succeed under favorable circumstances in recovering unpaid overtime through a lawsuit or a wage claim filed with the Labor Commissioner, a class action may still be justified if these alternatives offer no more than the prospect of 'random and fragmentary enforcement' of the employer's legal obligation to pay overtime." *Id.* at p. 462. [*citing Bell v. Farmers Ins. Exchange* (2004) 115 Cal. App. 4th 715, 745]

In sum, *Gentry*'s strong policy statements concerning wage and hour class actions declare the use of the class action device superior to any other means of enforcing California's wage & hour laws. Under California's strong public policy, Plaintiff's precertification discovery efforts should be allowed to move forward.

VII. PLAINTIFF'S PAGA CAUSE OF ACTION REQUIRES DISCLOSURE OF THE DISPUTED DISCOVERY REQUESTS ON BEHALF OF THE STATE OF CALIFORNIA AND DEFENDANT'S AGGRIEVED EMPLOYEES

Plaintiff's Ninth Cause of Action under PAGA is not a class claim seeking compensatory damages. Rather, Plaintiff is seeking *civil penalties* to be distributed between Defendant's "aggrieved employees" and the State of California under PAGA's penalty scheme. In fact, 75% of all penalties recovered by Plaintiff pursuant to his PAGA claim will be remitted to the State of California. *See* Labor Code § 2699(i).[8]

With respect to the present discovery dispute, PAGA's statutory scheme does not include any restriction that a Plaintiff must satisfy the requirements of a class action in order to recover civil penalties. To the contrary, Plaintiff has been commissioned by the Legislature to seek civil penalties for Labor Code violations alleged to have been committed against Defendant's current and former employees. The California courts have determined that Plaintiff's present efforts under PAGA are akin to a state enforcement investigation:

> Responding to a shortage of State funds and staffing to enforce State labor laws, the Legislature adopted the Act in 2003…to allow aggrieved employees…to bring a civil action to collect civil penalties for Labor Code violations previously only available in enforcement actions initiated by the State's labor law enforcement agencies. *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 374.

The legislative history of PAGA explains that the LWDA is "understaffed" and "under-funded," and therefore the purpose of the law is to rely on employee whistleblowers and their counsel to enforce the Labor Code in private civil actions. A recent decision explains that PAGA was enacted "to augment the enforcement abilities of the Labor Commissioner with a private attorney general system for labor law enforcement," and thus "**empowers or deputizes an aggrieved employee to sue for civil penalties**…" [Emphasis added.] *Dunlap v. Superior Court of Los Angeles County* (2006) 142 Cal. App. 4th 330, 337. Thus, Plaintiff has been commissioned, or "deputized," to pursue Labor Code violations against Defendant.

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[8] Pursuant to Labor Code § 2699(a), PAGA allows an employee to recover civil penalties "through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees…"

PAGA allows for the recovery of civil penalties by a private litigant, or "aggrieved employee," for specific violations of the Labor Code. "An aggrieved employee" is defined as "any person who was employed by the **alleged** violator and against whom one or more of the **alleged** violations was committed." Labor Code § 2699(c). [Emphasis added.]

Labor Code § 2699(g)(1) provides that "nothing in this section shall operate to limit an employee's right to pursue other remedies available under state or federal law, either separately or concurrently with an action taken under this section." There are absolutely no express or implied class action requirements set forth in PAGA's legislative scheme. As the United States Supreme Court has admonished, "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain* 503 U.S. 249, 253-54 (1992).

Defendants will be unable to cite to one case holding that a PAGA claim must be certified as a class action before proceeding to trial. In fact, a recent federal decision suggests that no such restrictions exist. In *De Simas v. Big Lots Stores, Inc.* (N.D. Cal., filed March 2, 2007) 2007 U.S. Dist. LEXIS 19257, the district court explains the scope of a plaintiff's PAGA claim: "Plaintiffs are thus correct that the '**aggrieved employee' bringing a PAGA claim need not have a valid claim for all of the violations brought under the claim**. The employee must, however, have a valid claim for at least one of those violations." *Id.* at pp. * 12-13. [Emphasis added.] Thus, if a plaintiff need not bring PAGA claims that contain the requisite typicality and commonality, it only follows that class certification is not required.

Defendant has failed to address Plaintiff's PAGA claim in its motion for protective order. This is likely true because there are no legal grounds sufficient to justify a delay of discovery pertaining to Plaintiff's PAGA claims. Under clear statutory and decisional law, PAGA mandates that the information sought in Interrogatory No. 1 be disclosed, and the documentation sought in Request for Production No. 3 be produced.

VIII. CONCLUSION

In determining whether good cause exists for a protective order, the Court may consider relevant factors such as: (1) is the information being sought for a legitimate purpose; (2) will the disclosure violate any privacy interest; (3) will disclosure cause a party embarrassment; 4) whether disclosure is important to public health and safety; (5) will sharing of the information among litigants promote fairness and efficiency in the litigation; (6) whether the party seeking the protective order is a public entity or official; and (7) whether the case involves issues of public importance. *Pansy v. Borough of Strousburg* (3rd Cir. 1994) 23 F.3d 772, 787-791.

In the case at hand, all of these factors weigh heavily in Plaintiff's favor:

(1) The information sought is to enforce a strong public policy under California's wage and hour laws;

(2) As explained in *Pioneer Electronics, BelAire-West Landscaping, Eli Lilly & Company* and all other cases cited in Section IV.A., *supra*, disclosure does not violate the privacy interests of putative class members;

(3) Defendant has not claimed disclosure will cause it embarrassment;

(4) Important public health and safety concerns will benefit from disclosure, as Plaintiff's discovery efforts are brought on behalf of Defendant's employees in order to obtain redress for Defendant's alleged failure to provide meal and rest breaks, and overtime compensation. If Plaintiff is successful in the present litigation, Defendant's employees will be afforded healthier and safer working conditions;

(5) As addressed in *Gentry, supra,* Plaintiff's discovery efforts are brought on behalf of employees who may not be aware of their rights or fear retaliation for fear of speaking out against Defendant's allegedly unlawful employment practices;

(6) Plaintiff's discovery efforts are also brought on behalf of the State of California pursuant to Plaintiff's PAGA cause of action; and

(7) As explained repeatedly throughout this brief, Plaintiff's proposed class action suit, as well as his claim under PAGA, involves issues of significant public importance.

Accordingly, the Court should deny Defendant's motion for a protective order under Fed. R. Civ. Pro. 26(c).

DATED: May 2, 2008

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